

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVIN BROWN, JR.,

Defendant-Appellant.

UNPUBLISHED

October 15, 2013

No. 310818

Saginaw Circuit Court

LC No. 11-035582-FC

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), conspiracy to commit first-degree home invasion, MCL 750.157a, armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, unlawful imprisonment, MCL 750.349b, and five counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to two years' imprisonment for the felony-firearm convictions, to be served consecutively to concurrent terms of 20 to 40 years' imprisonment for the home invasion, armed robbery, and conspiracy convictions, and 20 to 30 years' imprisonment for the unlawful imprisonment conviction. For the reasons stated in this opinion, we affirm.

I. FACTS

On January 13, 2011, defendant gave Porter Smith a ride to the victims' home. Smith identified the female victim as an ex-girlfriend and told defendant that he expected her to give him some money to fix his truck. Defendant suspected that Smith intended to force her to give him the money. When they arrived at the home, Smith entered wearing a ski mask and found the female victim in the bedroom with her husband. Smith threatened to shoot them unless they turned over their money and valuables and ordered the victims to strip. When the female victim did not respond, defendant and Smith removed her clothes. They had both victims lie on the floor while they searched the home. Defendant and Smith fled the residence after completing the robbery, and were apprehended by the police shortly after leaving. The police subsequently recovered Smith's ski-mask and handgun from a nearby alley. Defendant was convicted as previously stated, and this appeal ensued.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his five felony-firearm convictions. Specifically, defendant asserts that the female victim's eyewitness testimony that he was armed during the home invasion was equivocal. Defendant further argues that the evidence supported the conclusion that he was not armed because the evidence showed that defendant was apprehended almost immediately after he fled the victims' home, but that the police were only able to locate the firearm used by Smith when they searched the area between the victims' home and the site of defendant and Smith's apprehension.

We review sufficiency of the evidence issues de novo, examining the evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). Further, we will not interfere with the finder of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The female victim testified at trial that defendant was armed during the home invasion.¹ Viewing the evidence in the light most favorable to the prosecution, we conclude that the eyewitness account of the victim, who had extended time to observe defendant, is sufficient to support a reasonable finding that defendant was armed during the home invasion. Moreover, when the female victim's testimony is considered in context, it is clear that any equivocation she may have had was retracted. Moreover, it was the role of the jury to determine whether the victim's testimony that defendant was armed was credible. Finally, defendant had an opportunity, however brief, to discard the weapon in the time between the commission of the home invasion and defendant's subsequent apprehension. Accordingly, defendant's felony-firearm convictions were sufficiently supported by the evidence.

III. OFFENSE VARIABLE 7

Next, defendant argues that the trial court erred by scoring 50 points for Offense Variable (OV) 7.

In *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), the Court held:

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.

OV 7 provides:

¹ The male victim was hospitalized during trial and was not available to testify.

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A complainant was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a complainant suffered during the offense . . . 50 points

(b) No complainant was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a complainant suffered during the offense . . . 0 points

(2) Count each person who was placed in danger of injury or loss of life as a complainant.

(3) As used in this section, “sadism” means conduct that subjects a complainant to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. [MCL 777.37.]

In this case, the record shows that defendant assisted in stripping the female victim during the home invasion. The record also shows that defendant touched the female victim while stripping her, and that she felt humiliated as a result. While the focus must be on the defendant's conduct, not the victim's experience, *People v Kegler*, 268 Mich App 187, 191-192; 706 NW2d 744 (2005), given the gratuitous and humiliating nature of this behavior by defendant, a finding that defendant subjected the female victim to extreme or prolonged pain or humiliation, and that he did so for the purpose of his own gratification, was supported by the record.

Defendant argues that there was no evidence that he intended to humiliate the victims for his own gratification; however, we conclude that this intent can be inferred from defendant's conduct. Defendant also argues that physically stripping the female victim and forcing her to lie on the floor in such a state was not “extreme or prolonged” humiliation. Given the sex of the defendant and the victim, as well as the nature and duration of the offending behavior, such an argument is not supported by the record. Accordingly, the trial court did not err by declining to adjust the score of 50 points for OV 7.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that that defense counsel was ineffective for failing to object to the sentencing court's scoring of 50 offense variable points for OV 7.

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994).

Defendant has failed to demonstrate that he received ineffective assistance of counsel because, as discussed *supra*, the trial court did not err by scoring 50 points for OV 7, and defense counsel is not required to make futile objections. *People v Milstead*, 250 Mich App 391, 401;

648 NW2d 648 (2002). Moreover, this Court granted defendant a remand for the purpose of filing a motion for resentencing, *People v Brown*, unpublished order of the Court of Appeals, issued February 8, 2013 (Docket No. 310818), which defendant filed. The trial court denied defendant's motion, issuing a written opinion specifically finding that defendant physically assisted in stripping the female victim and that his actions inflicted extreme or prolonged humiliation for his own gratification. Thus, it is clear that defense counsel's failure to object did not affect the outcome of the proceedings.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra